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Nos. 84-406, 84-418

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,
vs.
OAKLAND RAIDERS, LTD. and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents

JOINT OPPOSITION TO NATIONAL BASKETBALL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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I. Permission for NBA to File an Amicus Brief Should Be Denied.

Respondents object to the motion of National Basketball Association ("NBA") for leave to file an *amicus* brief, and for two reasons.

First: NBA has not been diligent. On October 4, 1984 NBA's counsel requested consent to file from counsel for respondent Los Angeles Memorial Coliseum Commission and was refused. On October 4th, NBA counsel telephoned counsel for respondent Los Angeles Raiders, who was not then in his office, and did not pursue the request until October 8th. Consent was then refused. NBA should have filed its motion promptly. Raiders' counsel did not receive

a copy of the motion until October 18th, the very day on which respondents' joint brief in reply to the other *amici* briefs was transmitted for filing. Had the motion been presented sooner, a reply to it could have been included in respondents' joint reply to the other *amici* briefs.

Second: NBA's proposed brief does not assail the correctness of the decision of the Court of Appeals in this case, beyond a token statement that "we submit that the Court of Appeals erred" (p. 4). Instead, its discussion proceeds on two irrelevancies, both on the assumption that the decision below is correct. The first is that this Court should use the present case as a vehicle to provide a general disquisition or treatise on what might be called "the law of club relocation in professional sports" (p. 4). NBA laments that every relocation of a sports club produces a flurry of litigation with suits seeking to condemn sports clubs under eminent domain law, suits brought to enjoin suits under eminent domain law, suits for injunctions under common law or other state law suits under state antitrust laws, and the like. There is no way to prevent litigation in a litigious society. It is not a function of *certiorari* jurisdiction to utilize a particular case to resolve all the problems of society.

NBA's second reason for seeking *certiorari* is that, while it sought to amend *its* own relocation rule after the decision below, nevertheless *its* proposed rule is being assailed in current litigation. This is a request that the Court use the present *certiorari* petitions as a vehicle to issue an *advisory* opinion to govern the outcome of NBA's litigation concerning its own relocation rule, in which it had so little confidence that it allowed the Clippers to move without compliance.[1]

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[1]By contrast the NFL refused to permit the Raiders to move and successfully opposed a preliminary injunction by arguing that damages would be an adequate remedy.

For these reasons we submit that leave to file the brief should be denied. If, however, leave should be granted, we proceed below to answer the brief.

II. The NBA Has Not Devised Any Arguments Which Would Justify This Court's Grant of Certiorari.

NBA's motion for leave to file an *amicus curiae* brief seeks to induce this Court to grant *certiorari* on the false premise that the federal courts are unable to cope with the application of the antitrust laws to sports leagues. Accordingly, NBA concludes that sports leagues must be exempt from those laws.

The facts simply cannot be manipulated to support this incorrect image. As discussed in respondents' briefs, the circuits have been uniform and consistent in applying the Sherman Act to joint conduct by sports clubs. The lower courts have unanimously rejected the claim that sports clubs constitute a "single enterprise" not subject to Section 1 of the Sherman Act. Those circuits have also agreed that such conduct should be evaluated by the traditional Rule of Reason analysis prescribed by this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir. 1984); *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982) *cert. denied*, 459 U.S. 1074 (1982); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

Where the conduct at issue has been shown to have an anticompetitive purpose and effect, it was found to violate the Sherman Act. *E.g., NASL v. NFL, supra.* Where the conduct was shown to be for a legitimate purpose and to have no anticompetitive impact, it was upheld. *E.g., Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979)

(hockey league's safety rules upheld); *Molinas v. National Basketball Association*, 190 F.Supp. 241 (S.D. N.Y. 1961) (upholding league's rules on gambling).

Thus, the antitrust laws have been applied to the sports industry in precisely the same manner as any other industry, with no greater uncertainty or confusion. The only distinction is that the courts have applied the Rule of Reason to evaluate conduct by sports leagues which in any other industry would be condemned out of hand under a *per se* analysis. For example, the division of territories into exclusive markets which was the subject of this lawsuit is automatically condemned under the Sherman Act in any other industry.[2] *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). The Rule of Reason case-by-case approach surely involves less certainty than the extremes of the spectrum — *per se* condemnation or immunity. But it is the best mechanism for assuring that anticompetitive schemes are rejected while neutral or pro-competitive arrangements are permitted.

Contrary to NBA's brief, most sports league relocations are accomplished without litigation. Moreover, the brief flurry of lawsuits relating to moves by the Raiders and Colts were largely state court claims for breach of contract or eminent domain. Such actions would be unaffected by a grant of *certiorari* here. The same is true for the suits filed in the 1970's over the relocations of the Braves and the Jazz.[3]

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[2]The NFL's division of territories not only prevented head-to-head competition between the Rams and the Raiders but prevented the Raiders from competing with *all* NFL clubs for the revenue needed to acquire the best players, coaches and facilities.

[3]*City of Buffalo v. Atlanta Hawks*, No. 76 Civ. 261 (W.D.N.Y. 1976); *City of Buffalo v. Buffalo Braves, Inc.*, No. 30407 (Sup. Ct. Erie Co. 1976)

As to the "firestorm of legal activity" relating to the Clippers' relocation to Los Angeles, NBA neglects to mention that the *only* lawsuit filed in connection with the Clippers recent move was filed by the NBA itself. The recent circuit court decisions in this area have apparently settled the law in the eyes of everyone except NBA, which simply refuses to accept the outcome.

CONCLUSION

It is not the courts which are confused by the application of traditional antitrust principles to sports leagues. Nor are the leagues themselves genuinely confused; they simply are adamant in their refusal to accept that they are subject to the antitrust laws.

Large portions of the NBA's brief are lifted verbatim from testimony which an NBA spokesman recently gave in Congress. The NBA's plea for special treatment and immunity from the Sherman Act, like the NFL's, is properly addressed to Congress.

Respectfully submitted,

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